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Supreme Court of the United States

OCTOBER TERM, 1966

No. 1145

DENDY ROBERT SLIGH, PETITIONER,

versus

COLUMBIA, NEWBERRY AND LAURENS RAILROAD COMPANY, RESPONDENT

BRIEF FOR RESPONDENT IN OPPOSITION

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OPINIONS BELOW

The opinion of the District Court is reported at 250 F. Supp. 490 and is reprinted in an appendix to the Petition for Certiorari on page 9. The opinion of the Court of Appeals for the Fourth Circuit is reported at 370 F. (2d) 979 and is reprinted in an appendix to the Petition for Certiorari on page 15.

JURISDICTION

This Court has jurisdiction under 28 U. S. C. § 1254 (1).

QUESTIONS PRESENTED

1. Did the Court of Appeals for the Fourth Circuit err in holding that the District Court's findings of fact were not clearly erroneous, where on conflicting evidence the District Court held that there was no negligence on the part of the respondent which played some part in producing an injury to the petitioner?

2. Did the Court of Appeals for the Fourth Circuit err in holding that there was no error of law in the trial, with respect to (1) the handling of the questioning of one of petitioner's witnesses, and (2) the application and interpretation of the Federal Employers' Liability Act, 45 U. S. C., § 51, *et seq.*?

STATUTE AND RULES INVOLVED

The pertinent provision of the Federal Employers' Liability Act, 45 U. S. C., § 51, is set forth at page 3 of the Petition for Certiorari.

Rule 26 (d) (1) and (2), Federal Rules of Civil Procedure, is as follows:

> "(d) **Use of Depositions.** At the trial or upon the hearing of a motion or an interlocutory proceeding, any part or all of a deposition, so far as admissible under the rules of evidence, may be used against any party who was present or represented at the taking of the deposition or who had due notice thereof, in accordance with any one of the following provisions:
>
> (1) Any deposition may be used by any party for the purpose of contradicting or impeaching the testimony of deponent as a witness.
>
> (2) The deposition of a party or of any one who at the time of taking the deposition was an officer, director, or managing agent of a public or private corporation, partnership, or association which is a party may be used by an adverse party for any purpose."

Rule 43 (b), Federal Rules of Civil Procedure, is set forth at page 3 of the Petition for Certiorari.

Rule 46, Federal Rules of Civil Procedure, is as follows:

> "Formal exceptions to rulings or orders of the court are unnecessary; but for all purposes for which an exception has heretofore been necessary it is sufficient that a party, at the time the ruling or order of the court is made or sought, makes known to the court the action which he desires the court to take or his objection to the action of the court and his grounds therefor; and, if a party has no opportunity to object to a ruling or order at the time it is made, the absence of an objection does not hereafter prejudice him."

Rule 52 (a), Federal Rules of Civil Procedure, is as follows:

> "(a) **Effect.** In all actions tried upon the facts without a jury or with an advisory jury, the court shall find facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interloctuory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41 (b)."

STATEMENT OF THE CASE

[Appendix references in this brief are to appellant's and appellee's appendices filed in the court below, filed in this Court by Petitioner as part of the record pursuant to Supreme Court Rule 21 (3).]

Petitioner, formerly an employee of the respondent railroad, brought suit in the United States District Court for the District of South Carolina against the respondent under the Federal Employers' Liability Act, 45 U. S. C., § 51, *et seq.*, alleging he suffered an injury while assisting in moving a motor car from the railroad tracks. He claimed the railroad was negligent in "failing to provide sufficient employees to move the motor car and in failing to maintain its roadbed so that plaintiff had a safe footing." (Complaint, paragraph 5.) The railroad entered a general denial and alleged contributory negligence in diminution of damages.

The case was tried before the District Court sitting without a jury.

At the trial, the following facts were developed. On February 7, 1964, the petitioner and three other experienced railroad employees moved a motor car from the tracks. The motor car was moved by extending two metal bars three feet long, one from each side of the back end. The back is the light end because the motor is located at the front. (Appellee's Appendix, p. 45.) Two men held each bar, lifted and moved the back (light) end just enough so that the car was at an angle with the tracks. The front (heavy) end of the car was not lifted but remained in place. At no time was the whole car ever lifted. After the back (light) end was shifted clear of the tracks, the motor was activated and the car was driven off the tracks. (Appellee's Appendix, p. 43.) None of the witnesses present saw or heard anything indicating petitioner had injured himself (Appellee's Appendix, pp. 13, 20-21, 22-23, 25, 30,

48, 49 and 51), nor was an injury ever reported. (Appellee's Appendix, pp. 13-14, 45 and 46.)

All of the men who assisted the petitioner had helped move this and similar motor cars many times previously (Appellee's Appendix, pp. 5-6, 19, 21-22 and 25) and had done so with petitioner and each other. (Appellee's Appendix, pp. 14, 19, 22, 24 and 25.) The other men present at the site were busy with their other duties, preparing to leave. (Appellee's Appendix, pp. 31-32 and 49-50.)

The motor car was located on the paved crossing of the main line track, which was free of dirt and debris, away from the area where some grading had taken place. (Appellee's Appendix, pp. 3-5, 11-12, 16-18, 20, 26, 30-31 and 41-43.)

Subsequent to the moving operation, petitioner visited his personal physician, complaining he hurt his back "while lifting rails." (Appellee's Appendix, p. 27.) He was discharged a few days later (Appellee's Appendix, p. 28), returned to work on February 17 and was assigned regular duties. He reported no injury and made no request for light duty. (Appellee's Appendix, pp. 7, 13-14, 15 and 45-47.) Subsequently he again visited his doctor, who, finding no significant change in his condition, referred him to an orthopedic surgeon. (Appellee's Appendix, pp. 28-29.) The orthopedic surgeon found a congenital abnormality and some arthritic accretions around the abnormal joint, but nothing referable to any injury as alleged. (Appellee's Appendix, pp. 35-36 and 37-38.) About a year and a half later, the surgeon operated, correcting the congenital abnormality and cleaning the joint. (Appellee's Appendix, pp. 37-38.)

At the trial the evidence was in conflict, not only between petitioner and respondent's witnesses, but also between petitioner and his own witnesses. On the crucial

issues in the case, petitioner was not supported by any other witness which either he or the respondent called.

On this record, the District Judge, as the trier of facts, found that no negligence of the respondent railroad played any part in producing an injury to the petitioner and entered judgment for the respondent. This was affirmed by the Court of Appeals for the Fourth Circuit, which found that such findings were not "clearly erroneous" under Rule 52 (a), Federal Rules of Civil Procedure, and that there was no error of law.

Petitioner seeks a review of this decision by petition for certiorari under 28 U. S. C., § 1254 (1).

ARGUMENT

The Petition for Certiorari should be denied because the decision below was correct, because there is no conflict of decisions involved and because the case lacks general importance beyond its own facts and these litigants.

I. The Court of Appeals for the Fourth Circuit did not err in holding the District Court's findings were not clearly erroneous.

a. **Applicable law.** Under Rule 52 (a), Federal Rules of Civil Procedure, the findings of fact by a District Court may not be set aside unless "clearly erroneous," that is, unless the reviewing court is left "with the definite and firm conviction that a mistake has been committed." *United States v. U. S. Gypsum Co.*, 333 U. S. 364, 395 (1948). Where there is substantial evidence to support the trial judge's findings, it cannot be said that he was "clearly erroneous." *McAllister v. United States*, 348 U. S. 19 (1954); *Passaro v. Norfolk & W. Rwy. Co.*, 254 F. (2d) 716 (4th Cir. 1958).

In this case the trial judge found for the respondent on conflicting evidence. A review of the record will show,

however, that the only substantial conflict was between the petitioner himself and all the other witnesses who testified, including his own.

Petitioner's complaint alleged two specifications of negligence: insufficient personnel and improperly maintained roadbed.

b. **Claim of insufficient personnel.** Petitioner's claim of insufficient personnel was contradicted by the three men who were helping petitioner move the car (Appellee's Appendix, pp. 20, 21, 23 and 25), by the petitioner's other witnesses (Appellee's Appendix, pp. 8 and 31), and by the respondent's witnesses. (Appellee's Appendix, pp. 44, 47-48, 48-49, 50, 51 and 52). Some of these witnesses testified that four men were the customary and usual number used, some that four men were a sufficient number to use, and some that less than four could be and had been used to remove this and similar motor cars. This claim of insufficient personnel was not substantiated by any witness in the case except petitioner himself.

There was evidence from petitioner's own witnesses that the respondent's foreman did not designate any particular men to move the car. (Appellee's Appendix, pp. 13, 19, 24, 32; Appellant's Appendix, p. 41.) All of the men helping petitioner were experienced employees and had worked together many times before. (Appellee's Appendix, pp. 5-6, 14, 19, 21-22, 24 and 25.) Petitioner's claim that the other men did not, or that one of the men could not, render him adequate assistance was refuted in part by petitioner himself (Appellee's Appendix, p. 5), by the fact that he could not see the other men helping him (Appellee's Appendix, p. 5) and by the testimony of these men (Appellee's Appendix, pp. 20, 22, 25 and 26), all called as petitioner's witnesses. His claim of their unwillingness or inability is not substantiated by any other witness.

The car was empty of tools (Appellee's Appendix, pp. 14 and 23), and respondent's roadmaster, who worked his way up from laborer and had personally moved the car with only one other man, testified that the effective weight being lifted by the four men was only 250-300 pounds. (Appellee's Appendix, p. 44.)

c. **Claim of improperly maintained roadbed.** Petitioner's claim of an improperly maintained roadbed is similarly contradicted by all of his own witnesses. The car was being removed from the paved mainline crossing (Appellee's Appendix, p. 4), and petitioner's three witnesses who testified thereabout said it was in about the middle of the paved crossing. (Appellee's Appendix, pp. 12-13, 20 and 26.)

There was no testimony, other than petitioner's, that the area was improperly maintained or that there was dirt or debris on the crossing for petitioner to step into. On the contrary, petitioner's own witnesses testified that the crossing was clean. (Appellee's Appendix, pp. 12, 20, 26 and 30-31.) This is further substantiated by petitioner's witnesses' testimony that the grading in the vicinity took place away from the paved crossing. (Appellee's Appendix, pp. 11-12, 16-18 and 30-31.) One of respondent's witnesses testified similarly. (Appellee's Appendix, pp. 42-43.)

d. **Claim of failure to assign light duties and later injury.** Petitioner's complaint contained no allegation with reference to alleged failure of the respondent to assign light duties or of any fresh injury or aggravation of a prior injury. Yet at the trial petitioner testified that on February 17, 1964, about ten days after the alleged injury for which be brought suit, he was overworked and sustained some kind of injury. Here again, there is a sharp conflict between petitioner's claims and the balance of the testimony. On cross examination, he himself admitted he made

no request for light duty. (Appellee's Appendix, p. 7.) There is unequivocal testimony that he reported no injury or made any request for light duty. (Appellee's Appendix, pp. 13-14, 15, 23 and 45-47.) He reported back to work for regular duty, having been discharged by his doctor. (Appellee's Appendix, p. 28.)

He described the work to which he was assigned as "our little general work." (Appellant's Appendix, p. 24.) In the work assigned, he was assisting two or three other men unloading cross-ties, and all but the petitioner's own testimony indicates this was a sufficient number to be assigned to that job. (Appellee's Appendix, pp. 15, 24, 31, 46, 49, 50, 51 and 52.) There was ample testimony that he made no complaint that his work was too strenuous and he appeared to be doing his work satisfactorily. (Appellee's Appendix, pp. 23, 26, 48, 50 and 52.)

e. **Medical evidence.** Petitioner failed completely to connect the medical treatment he received with any injury or accident alleged or with any negligence on the part of the respondent. His principal medical expert, an orthopedic surgeon, testified he found basically two conditions: congenital abnormality at the first sacral vertebra and arthritic accretions at the same place. His operation corrected these two conditions. Neither was referable to the alleged accident. (Appellee's Appendix, pp. 35-38.)

After receiving the evidence recited above, the District Court found no negligence on the part of the respondent which played any part in producing any injury as alleged in the complaint or as petitioner sought to establish at the trial. Petitioner's contention that the District Court found no injury is incorrect. He found no injury as alleged in the complaint, *i.e.*, as a result of inadequate assistance in moving the motor car or failure to maintain the roadbed; or as petitioner tried to prove at the trial, *i.e.*, as a result of failure to assign light duty subsequently. This is what

the petitioner had the burden of proving, and the trial judge, as the trier of facts, concluded that he had failed. His conclusion is supported not only by "substantial evidence," but by the overwhelming weight of the evidence. Hence the Court of Appeals did not err in holding that the District Court's findings were not "clearly erroneous."

II. The Court of Appeals for the Fourth Circuit did not err in holding there was no error of law in the trial.

Nor did the Court of Appeals err in holding there was no error of law in the trial. In the Court of Appeals, petitioner's only assignment of error was his claim that the trial judge refused to permit him to cross examine one of his witnesses whose trial testimony supposedly differed from his deposition. This is not argued in the Petition, but it appears as a part of the first of petitioner's question's presented.

Based on the arguments below, the witness involved was J. E. Sligh; he was called by petitioner; he was one of respondent's foremen. Rules 43 (b) and 26 (d) (2) were said to have been violated.

A review of the record (Appellee's Appendix, pp. 9-11; Appellant's Appendix, pp. 33-35), shows that petitioner's counsel did not raise any issue of the witness' unwillingness or hostility or the question of whether he was an officer, director or managing agent. No motion was made to cross examine. Hence, under Rule 46, Federal Rules of Civil Procedure, no opportunity was given the trial judge to rule on petitioner's position, if he objected to any of the judge's actions. *Rossano v. Blue Plate Foods, Inc.*, 314 F. (2d) 174 (5th Cir. 1963), cert. denied, 375 U. S. 866; *American Fidelity & C. Co. v. Drexler*, 220 F. (2d) 930 (5th Cir. 1955); *Virginia-Carolina Tie & Wood Co. v. Dunbar*, 106 F. (2d) 383 (4th Cir. 1939); 5 Moore, *Federal Practice*,

¶46.02, p. 1902. See also *Tyrrell v. District of Columbia,* 243 U. S. 1 (1917).

Even if the question had been raised, the witness does not qualify as a "managing agent" within the meaning of Rules 43 (b) or 26 (d) (2). *Rossano v. Blue Plate Foods, Inc.,* 314 F. (2d) 174 (5th Cir. 1963), cert. denied, 375 U. S. 866; *Hosie v. Chicago and N. W. Rwy. Co.,* 282 F. (2d) 639, (7th Cir. 1960), cert. denied, 365 U. S. 814; *Dowell, Inc., v. Jowers,* 182 F. (2d) 576 (5th Cir 1950). Nor is there anything in the record to show that the witness was unwilling or hostile to the petitioner.

Petitioner's assertion of an issue under Rule 26 (d) (1) was not raised either in the trial court or the Court of Appeals and appears for the first time in the case in the Petition for Certiorari. Hence it is not properly before this Court. *Lawn v. United States,* 355 U. S. 339, 363, n. 16 (1958); *California v. Taylor,* 353 U. S. 553, 557, n. 2 (1957); *Tyrrell v. District of Columbia,* 243 U. S. 1 (1917).

But even apart from the foregoing objections to these issues, there was no error. Petitioner's counsel was given free reign in asking questions. He was permitted to introduce the witness' deposition without opposition. He was permitted freely to contradict the witness, he asked leading questions, and, after initial argument over petitioner's use of the deposition to contradict, which the judge permitted (Appellee's Appendix, p. 10), respondent made no objection to any question petitioner's counsel asked the witness. Hence, petitioner was not prejudiced by the conduct of the trial judge in any event. The Court of Appeals was therefor correct in finding no error of law in the trial.

III. There is no conflict of decisions.

Petitioner asserts that the decision in this case is in conflict with *Rogers v. Missouri Pacific R. Co.*, 352 U. S. 500 (1957), *Meeks v. Georgia Southern & Florida Rwy Co.*, 377 U. S. 405 (1964) and *Blair v. Baltimore & O. R. Co.*, 323 U. S. 600 (1945). But there is no conflict. In each of those cases the trier of facts, on disputed evidence, had found for the plaintiff, and the Supreme Court later granted certiorari, reversed the appellate court's action in setting the verdict aside and reinstated the original verdicts of the triers of fact.

In this case, the trier of facts, on disputed evidence, found for the respondent, and the Court of Appeals affirmed this finding, holding that it was not "clearly erroneous" under Rule 52 (a), Federal Rules of Civil Procedure. In those cases cited by petitioner, the appellate court had either substituted its view of the evidence or erroneously misconstrued the law relating to F. E. L. A. cases. But in this case there has been no substitution by an appellate court of its view of the facts, and there has been no misconstruction of F. E. L. A. law.

The District Court cited the *Rogers* case, 352 U. S. 500 (1957), and recognized that any negligence whatsoever will render a railroad liable for an employee's injury if it played any part at all in producing the injury. But the petitioner failed to prove that the railroad was guilty of any negligence which played any part in producing an injury to the plaintiff. Petitioner's allegations of negligence were not substantiated by any of his witnesses and were explicitly refuted by the petitioner's own witnesses as well as those of the railroad. Hence, the District Judge's finding of no negligence was not only not "clearly erroneous"; it was also a correct finding.

Petitioner hints that an element of contributory negligence defeated his recovery. But the District Court's find-

ings of fact and conclusions of law are not based on contributory negligence but on the absence of railroad negligence.

Petitioner asserts that the District Court misconstrued the provisions of the F. E. L. A., but he does not show wherein this is true. The finding that petitioner knew his own strength is not contradictory to his finding of no employer negligence, but is only an incidental additional finding which, if anything, supports his finding that no employer negligence played any part in any injury to the petitioner.

Although the result in this case is different from the cases claimed to be in conflict, there is in fact no conflict. They are consonant, because in those cases and in this one the findings of fact by the trier of facts have been upheld.

IV. The case lacks general importance.

The District Court recognized the import of the *Rogers* case, 352 U. S. 500 (1957), and made findings of fact in the light of that case. There is no conflict among the circuits nor between this case and a decision of this Court. The issues involved do not present any new issue to this Court. The decision at the trial level was one based solely on the facts, and the findings were not found to be clearly erroneous by the Court of Appeals.

Hence, this case lacks general importance beyond its facts and the litigants involved. It establishes no new precedent, nor does it depart from an old precedent. In reality, since the findings of the trier of fact are supported by overwhelming evidence and there was no error of law in interpreting the F. E. L. A. or in the conduct of the trial, the Court of Appeals' affirmance of the District Court was based upon the decisions of this Court.

CONCLUSION

For the foregoing reasons, it is respectfully urged that the Petition for Certiorari be denied.

Respectfully submitted,

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March 30, 1967